

Supreme Court, U. S.
FILED

AUG 29 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 77-536

MIRIAM WINTERS, on behalf of herself and
all others similarly situated,

Petitioner,

- against -

ALAN D. MILLER, M.D., individually and as
Commissioner of Mental Hygiene of the
State of New York; FRANCIS J. O'NEILL,
M.D., individually and as Director of
Central Islip State Hospital; and
Doctors H. BLANKFELD, DUSAN KOSOVIC,
SANDRA GRANT, GERALD OLLINS, CHRISTINE
JORDAN, THOMAS DaCORTA, and CATHERINE
DROMGOOLE, and other doctors on the
staffs of Bellevue and Central Islip
State Hospitals whose names are unknown
to plaintiff,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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August 24 1977

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PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Miriam Winters, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered in these proceedings on June 2, 1977.

OPINIONS BELOW

The opinions, orders and judgments entered below by the Court of Appeals and the United States District Court for the Eastern District of New York, none of which are yet reported, appear in the Appendix annexed to this petition.

JURISDICTION

The order and judgment of the Court of Appeals for the Second Circuit was entered on June 2, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When as a matter of state law only a person adjudged legally incompetent can be subjected to forced medical treatment:

Can forced medication including intramuscular injections over a competent person's religious objections be justified at a trial assessing damages by the defense that the religious objections were irrational and so justified the "treatment", or doesn't the admission of such testimony violate the First Amendment?

STATEMENT OF THE CASE

Petitioner Miriam Winters was involuntarily admitted to Bellevue Hospital, New York City, in May, 1968, and transferred from there to Central Islip State Hospital, where she was confined for several months. Throughout her stay at Bellevue and Central Islip Hospitals, Miss Winters was regularly given medication, including heavy doses of tranquilizers administered both orally and intramuscularly. From the moment she was first taken to Bellevue Hospital, and continuing to the day of her release from Central Islip, Miss Winters made unequivocally clear to all her attendants that she opposed any type of medication because she was a believer in Christian Science healing. Her constant and consistent religious objections were ignored.

Miss Winters then commenced the present action for money damages, under 42 U.S.C. § 1983 (1976), against the directors of Bellevue and Central Islip State Hospitals, the New York State

Commissioner of Mental Hygiene, and the staff doctors involved, for violation of her constitutional and civil rights. The United States District Court for the Eastern District of New York dismissed the complaint for failure to state a claim upon which relief could be granted.

Winters v. Miller, 306 F. Supp. 1158 (E.D.N.Y. 1969).

The Court of Appeals for the Second Circuit reversed and remanded the case, after finding that petitioner's assertions of Christian Science belief were genuine, that Miss Winters had not been declared legally incompetent,* that she was in fact involuntarily medicated against her express objec-

* The importance of this conclusion is that "the law is quite clear in New York that a finding of 'mental illness' even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is 'incompetent' or unable adequately to manage his own affairs."

Winters v. Miller, 446 F.2d 65, 68 (A 56)
(2d Cir.), cert. denied, 404 U.S. 984 (1971).

Thus, without a prior formal adjudication of legal incompetency, respondents were barred by state law, as well as the compulsion of the First Amendment, from conducting any inquiry into the genuineness of petitioner's professed beliefs. Allowing the testimony of which petitioner complains was therefore a fresh violation of the very proposition made clear in the first decision on appeal in this case.

tions, and that therefore "her First Amendment rights were violated as a result of compulsory medication." Winters v. Miller, 446 F.2d 65, 70 (2d Cir.), cert. denied, 404 U.S. 984 (1971) (A 61). After two intermediate appeals, Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) (prohibition against F.R.C iv. P. Rule 35 examination), and Winters v. Miller, 517 F.2d 1337 (2d Cir. 1975) (remand for trial after erroneous dismissal and reinstatement), the case finally came on for trial in July, 1975. At the trial, defendants proceeded to put petitioner's mental state, and thus the validity of her beliefs, into controversy. For example, Dr. Howard Blankfeld, who was the primary admitting physician, testified as follows:

Q. So you were aware at that time that the patient did not want medication on religious grounds?

A. Can I comment on that? I was aware that the patient did not want medication, and that she was refusing medication on religious grounds. I don't know that I would necessarily draw the conclusion that that was all or that was the only reason she was refusing medication. As a matter of fact, I had my own thoughts why she

was refusing medication which had to do with the fact that she didn't think she was mentally ill.

Trial Transcript, at 512 (A 73). Throughout the trial, the court allowed evidence over objection as to petitioner's state of mind, which was totally irrelevant since the commitment itself was not challenged; thus the only import of such evidence was to discredit petitioner's religious beliefs. See Trial Transcript, at 292 (A 71).

That trial resulted in jury verdicts in favor of all defendants, including two who defaulted.

Petitioner moved for a new trial pursuant to F.R.C iv. P., Rule 59(a), which was denied December 16, 1975. Memorandum and Order, dated December 16, 1975. (Doc. No. 69-C-783) E.D.N.Y. Judd, J.) (A

5). Appeal was immediately taken to the Second Circuit, but due to delays in obtaining trial transcripts, the appeal was not argued until June 2, 1977. In the interim, petitioner had made a second motion for a new trial in the Eastern District based on the unavailability of those transcripts; that motion was denied on March 1, 1977. Memorandum

and Order, dated March 1, 1977 (Doc. No. 69-C-783) E.D.N.Y., Mishler, Ch. J.) (A 42). On June 2, 1977, the Court of Appeals for the Second Circuit affirmed the denials of both of petitioner's motions for a new trial. Memorandum, Order and Judgment, dated June 2, 1977 (Doc. No. 76-7053) (2d Cir.) (A 1). Miss Winters now petitions this Court to grant a writ of certiorari to review that order and judgment of the Court of Appeals.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF RELIGION BECAUSE IT APPROVES AN INQUIRY INTO THE GENUINENESS OF HER BELIEFS.

One of the few undisputed principles of constitutional law is that the free exercise clause of the First Amendment absolutely prohibits the State from conducting inquiry into religious beliefs. "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." United States v. Ballard, 322 U.S. 78, 86 (1944). See also

West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943). But freedom of belief is nugatory without a corresponding right to act, or not act, because of those beliefs. For example, Amish parents may refuse to send their children to public schools in order that their religious life-style may survive. Wisconsin v. Yoder, 406 U.S. 205 (1972). Thus this general but well-accepted proposition:

It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control

Id. at 220 (citations omitted).

Petitioner asserts that the Court of Appeals for the Second Circuit, in its first decision in this case, correctly applied these principles in holding that her First Amendment rights were violated as a matter of law by forced medication in disregard of her expressed religious objections. See Winters v. Miller, 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 984 (1971) (A 52). The Second Circuit recognized that under the law of the State of New York, respondents were constitutionally compelled to accept Miss Winter's objections to treatment absent a formal finding of legal incompetence, or some immediate physical threat to herself or others. Id. at 68-69 (A 56-58). Since the record on appeal at that time included all of the hospital records plus sworn affidavits of petitioner, the Second Circuit was able to state unequivocally that her religious beliefs were genuine, id. at 68, (A55,58), and that respondents had in fact ignored her objections and medicated her against her will. Id.

Thus petitioner concluded that she had, for all practical purposes, been granted summary judgment on the issue of liability, and that the only issues left for trial were the extent of the damages, which particular physicians were responsible for particular acts of medication, and whether any of those physicians might be able to assert a defense of good faith. Judge Moore of the Second Circuit, dissenting in part, apparently agreed with that conclusion: he objected to "the court's determination that it should reverse the trial court's grant of defendants-appellees motion for summary judgment and, in effect, granting summary judgment for the plaintiff." Id. at 72 (A 65). The trial court, however, interpreted the Court of Appeals' "remand" in its most literal terms, see Memorandum and Order, dated Dec. 16, 1975, at 20 (A 39-40) (Doc. No. 69-C-783) (E.D.N.Y., Judd, J.), and allowed some respondents to present their belief that her religious objections to treatment were irrational and that medication was ordered for her own good. See, e.g. testimony of Dr. Howard Blankfeld, Trial Transcript

at 512 (A 73). Throughout the long history of this case, petitioner has consistently argued that such testimony should be inadmissible; on the present appeal, she has argued that its receipt specifically violated the law of the case, and was of such prejudicial effect as to require a new trial. (Many other errors of law were argued as well in support of the motion for a new trial.) The Second Circuit concluded, however, that its first opinion in this case did not mean what petitioner and Judge Moore thought it meant, and the denial of the motion for a new trial was affirmed. See Memorandum and Order, dated June 2, 1977 (Doc. No. 76-7053) (2d Cir.) (A 73).

Petitioner strongly believes that the Second Circuit's reading of its first opinion, and the trial conduct which that reading sanctions, violates the main principle for which United States v. Ballard, 322 U.S. 78 (1949), stands. For when it is clear that sincerely expressed religious beliefs must be taken at face value, and that physicians in state and city-run hospitals may not ignore those beliefs

absent a finding of legal incompetency or immediate physical danger, then to allow those physicians to claim at trial to a jury that such beliefs are irrational and thus treatment is justified, is to put patients to the proof of their religious doctrines or beliefs. 322 U.S. at 86. Witnesses cannot be compelled under oath, and under the Constitution of the United States, to testify on the way in which they hold their chosen religious tenets. There should have been no testimony allowed at trial concerning petitioner's beliefs and/or her mental condition at the time of her involuntary commitment (prior to its receipt in evidence, timely objection was, of course, made). As the Second Circuit correctly concluded the first time around, "there [was] no justification for defendants-appellees substituting their own judgment for that of their patient." Winters v. Miller, 446 F.2d at 69 (A 58) (emphasis supplied). This conclusion was necessary both as a matter of constitutional and state law. Moreover there was a constitutional compulsion as well as a statutory

scheme to read the law to preclude such substitution of judgment or inquiry into sincerity or rationality of belief. Legally precluded from substitution, the doctors had to be liable for having in fact substituted their judgment over religious objections. The trial should have redressed the damages — instead the court allowed repetition of the same Constitutional tort as a defense — the prohibited characterisation of a competent person's religious beliefs as "irrational" and justifying compulsory treatment. If the state law had been followed, the Constitution respected, or the correct interpretation of the first 2nd Circuit decision followed, such a defense would not have been entertained nor improper prejudicial testimony admitted.

The decision below for which Miss Winters seeks a writ of certiorari thus approves an inquiry into her religious beliefs, an inquiry which is forbidden by the First Amendment's free exercise clause. If the trial court had followed the law of the case, as petitioner requested

at the beginning of trial and thereafter repeatedly, and limited the case to the issues of damages, particular defendants, and possible defenses,* there would have been no fresh invasion of Miss Winters' First Amendment rights. Instead the trial itself — ostensibly a vehicle to vindicate the original violation of her constitutional rights — became the vehicle for yet another assault on the sincerity of her beliefs and her corresponding right to refuse medical treatment. In choosing not to recognize that petitioner's reading of its first opinion is the only interpretation that

* Petitioner's reading of the Second Circuit's first opinion is not an attempt to escape application of the good faith defense. She fully realizes that the doctrine of Wood v. Strickland, 420 U.S. 308 (1975), and other cases applies to this case premised on 42 U.S.C. § 1983. The issue of general liability can still be foreclosed, however, and the culpability of individual physicians still addressed at trial. If that procedure had been followed, and the good faith defense properly presented to the jury — which was not done at trial, as petitioner argued extensively in her brief to the Second Circuit — the principles of both United States v. Ballard and Wood v. Strickland would have been satisfied, and petitioner would have been afforded the fair trial which she deserves.

squares with the rule established by Ballard and subsequent cases,* the Second Circuit has committed an error of law which this Court should review and reverse.

* Petitioner's counsel has long believed that

The Constitution removes from condemnation those beliefs that are put forth as religious. If a man clearly presents that which he wishes others to believe or act upon as religious. . .[it is] private meaning for individuals — a meaning given to it by a religion. . .[and it] is thereby sacrosanct. . .the law must not entertain descriptions and accounts of religion.

Weiss, Privilege, Posture and Protection "Religion" in the Law, 73 Yale L.J. 593, 605, 608, 607 (1964).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner
2095 Broadway - Suite 304
New York, New York. 10023
Tel.: 595-1340

Dated: New York, New York

August 1977.

Al
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred and seventy seven.

Present: HON. IRVING R. KAUFMAN,
Chief Judge
HON. ROBERT P. ANDERSON and
HON. WALTER R. MANSFIELD,
Circuit Judges,

-----x
MIRIAM WINTERS, on behalf
of herself and all others
similarly situated,

Appellant,

v.

ALAN D. MILLER, M.D.,
individually and as the
Commissioner of Mental
Hygiene of the State of
New York; FRANCES J.
O'NEILL, M.D.,
individually and as
Director of Central
Islip State Hospital;
and Doctors H. BLANKFELD,
DUSAN KOSOVIC, SANDRA
GRANT, GERALD OLLINS,
CHRISTINE JORDAN, THOMAS
DaCORTA, and CATHERINE
DROMGOOLE, and other
doctors on the staffs of
Bellevue and Central
Islip State Hospital
whose names are unknown
to plaintiff,

Docket No.
76-7053

Appellees.

-----x

Appeal from the United States
District Court for the Eastern
District of New York.

This cause came on to be heard
on the transcript of record from
the United States District Court
for the Eastern District of New York,
and was argued by counsel.

ON CONSIDERATION WHEREOF, it is
now hereby ordered, adjudged, and
decreed that the judgment of said
District Court be and it hereby
is affirmed.

We do not agree with appellant
that the trial court failed to
follow the "law of the case" as
set out in our opinion in Winters
v. Miller, 446 F.2d 65 (2d Cir.),
cert. denied, 404 U.S. 984 (1971),
which held only that the district

court had been in error in granting
summary judgment for defendants and
ordered that appellant be given an
opportunity to try her case before a
judge and jury. This was done.

Appellant's other contentions are
without merit. A review of the
"overall charge" to the jury, Cupp
v. Naughten, 414 U.S. 141, 147 (1973),
leads us to conclude that the trial
judge gave adequate instructions
under applicable law. We affirm
the denial of appellant's second
motion for a new trial dated
March 1, 1977, based on the unavail-
ability of stenographic transcripts,
for the reasons well set out in
Chief Judge Mishler's opinion. We
also hold that the appellant's claims
of prejudice by the trial judge are
not substantiated by the record.

A4

/s/
Irving R. Kaufman,
Chief Judge

/s/
Robert P. Anderson

/s/
Walter R. Mansfield,
Circuit
Judges

June 2, 1977

A5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
MIRIAM WINTERS, on behalf of :
herself and all other persons: 69-C-783
similarly situated, :

Plaintiff, :

-against- :

ALAN D. MILLER, M.D., :
individually and as Commissioner of Mental Hygiene :
of the State of New York; :
FRANCIS J. O'NEILL, M.D., :
individually and as Director of Central Islip State :
Hospital; DOCTORS H. :
BLANKFELD, DUSAN KOSOVIC, :
SANDRA GRANT, GERALD OLLINS, :
CHRISTINE JORDAN, THOMAS :December
DaCORTA and CATHERINE : 16, 1975
DROMGOOLE and other doctors :
on the staffs of Bellevue :
Hospital and Central :
Islip Hospital whose :
names are unknown to :
plaintiff, :

Defendants. :

-----x
Appearances:

BRUCE J. ENNIS, ESQ.
New York Civil Liberties Union
and
JONATHAN A. WEISS, ESQ.
PHILIP M. GASSEL, ESQ.
Legal Services for the Elderly
Poor
Attorneys for Plaintiff

HON. LOUIS J. LEFKOWITZ
 Attorney General of the State
 of New York
 Attorney for Defendants Miller,
 O'Neill, DaCorta and Dromgoole

By: STANLEY L. KANTOR, ESQ.
 Assistant Attorney General
 of Counsel

Appearances (continued):

HON. W. BERNARD RICHLAND
 Corporation Counsel of the City
 of New York
 Attorney for Defendants
 Blankfeld and Ollins

By: GEORGE A. WEILER, ESQ.
 Assistant Corporation
 Counsel
 of Counsel

J U D D, J.

MEMORANDUM AND ORDER

Plaintiff's motion to set aside
 the verdict in this case and for a
 new trial, pursuant to F.R.C.P. 59(a),
 lists eighteen separate grounds.

Facts

This civil rights action seeks
 damages for the administration of

medication in city and state hospitals
 in alleged violation of the plaintiff's
 religious objections and rights, as
 one who believed in Christian Science.

The case has been to the Court of
 Appeals three times: 446 F.2d 65
 (2d Cir.), cert. denied, 404 U.S. 985,
 92 S.Ct. 450 (1971), reversing Judge
 Travia's order, 306 F. Supp. 1158
 (E.D.N.Y. 1969), which granted summary
 judgment for the defendants who were
 named in the original complaint; sub
 nom., Winters v. Travia, 495 F.2d 839
 (2d Cir. 1974), reversing Judge

Travia's order which directed plaintiff
 to submit to physical and psychiatric
 examinations (sic); and 517 F.2d 1337
 (2d Cir. 1975), reversing Judge Judd's
 order which refused to reopen the
 case as to defendants Miller and
 Ollins. All these decisions were

prior to any trial. Therefore, in order to examine plaintiff's grounds to set aside the verdict in context, it is necessary to state the basic facts as they actually developed at the trial.

The original complaint in this action was filed in July 1969. Most of the defendants were not named by the plaintiff or served until January 1974. The parties were not deposed until September 1974.

On the argument of the second proceeding in the Court of Appeals, the plaintiff's counsel agreed, as a condition of relieving her from the requirement of physical and psychiatric examinations, that no damages would be claimed for any present physical disability or mental disturbance arising from the defendants' alleged acts.

The concrete case presented by the evidence is different from the somewhat abstract issues which have heretofore been presented to the courts.

Plaintiff was taken in a police ambulance to Bellevue Hospital on May 2, 1968, after she had been involved in a noisy dispute with the manager of the King Edward Hotel in Manhattan. The argument concerned change of accommodations requested by the management and approved by the case worker of the Welfare Department, which supported her financially. When the police came to her room, she refused to open the door to let them in. They had to break down the door and remove her in a strait jacket. No action was brought against the police, the

City or the hotel management.

Plaintiff's condition upon arrival at Bellevue Hospital was described by Dr. Blankfeld, who was on duty in the Emergency Room that night, as "Evasive, guarded, suspicious, negative," with her speech "Pressured, L.O.A., tangential, irrelevant, illogical," and her judgment and insight "Nil." She spent eleven days at Bellevue Hospital and about two months at Central Islip State Hospital. Plaintiff consented to her transfer from Bellevue to Central Islip, although she was informed of her right to go before a judge. She signed an acceptance of voluntary status during the course of her stay at Central Islip. She was discharged as improved on July 18th. During her hospitalization plaintiff was attended

by some sixteen doctors, of whom only seven have been sued, and only six were served. Plaintiff's counsel stated at the beginning of his opening that there would be no challenge to the legality of plaintiff's hospitalization.

Plaintiff's personality was not one likely to appeal to a jury. She did not attend any part of the five-day trial, except for the few hours she was on the stand as a witness. Her father was a doctor. She had never worked, and was supported by welfare payments after she had spent her inheritance. Her demeanor on the stand was combative and argumentative.

As a representative of Christian Science, she was not the best. She had called for a doctor a month or so before the incident, explaining that

this was necessary in order to persuade the Welfare Department that she was entitled to a room with a private bath at the Hotel Pierrepont in Brooklyn.

A Christian Science practitioner spoke to her at Bellevue and one visited her at Central Islip as well, but neither of them was called as a witness, and there is no evidence that either of them complained about her being medicated. Plaintiff did, however, refuse, on Christian Science grounds, a proffered dental examination while at Central Islip. The examination was not given. She went to Long Island College Hospital shortly after her release from Central Islip, with her Christian Science practitioner's approval, because she said she had a terrible breathing problem. She took medicine once or twice a day after it was

prescribed at Long Island College Hospital, although she testified that the medicine didn't help. The Bellevue records show that she had a vaccination mark on her left arm. Although she asserted that these notations were a lie, she did not raise her sleeve in order to demonstrate whether there was a vaccination mark.

No member of the Church of Christ Scientist was called to describe the practice of the church with respect to medicine. A psychiatrist witness for the plaintiff, who had read Mary Baker Eddy's books, and had taken a course in Christian Science methods of healing at Union Theological Seminary, stated that the general tenets of the sect were that medication is silly, and that illness does not exist, or constitutes error, but that

interpretation is left to the individual.

Apparently there are many patterns of belief on the subject.

Most of plaintiff's witnesses dealt with the psychological effects of undesired medical treatment. They asserted that such treatment would create hostility that would be adverse to the optimum patient-doctor relationship. No claim of medical malpractice was involved, however.

The plaintiff was diagnosed at Bellevue as suffering from a schizophrenic reaction, paranoid type. Although plaintiff's witnesses stated that there were alternatives to medication for such a condition, the evidence was clear that thorazine, one of the principal drugs administered to plaintiff, was generally recognized in 1968 as an acceptable, and even preferred, treatment for

schizophrenics.

In the nature of a civil rights action, liability is personal. Of all the doctors whose names appear on the medical charts, Dr. Christine Jordan at Central Islip administered more medication than anyone else. She was not served although named as a defendant. She now resides in Germany, but might be subject to long arm jurisdiction.

Dr. Blankfeld, who was in the Emergency Room at Bellevue on May 2, 1968, was the first doctor to see the plaintiff. He did not perform the usual physical examination because she objected on the basis of her Christian Science beliefs. He noted that she "looks well." He noted, as described above, that she was "Evasive, guarded, suspicious . . . irrelevant, illogical," with no judgment or insight. He directed that

she be sent to the female disturbed ward and given thorazine intramuscularly at once and oral doses thereafter. He was not present when the intramuscular dosage was given, by injection forcibly in her buttocks. Dr. Blankfeld testified at the trial that he had no recollection of the plaintiff's case, but that his notes indicated that she appeared to be severely mentally ill. It was his professional opinion that refusal to treat her would have been improper, and that the medication he prescribed was in her best interest.

The name of Dr. Ollins, another Bellevue doctor, did not appear on the medical order sheet. The plaintiff based his liability on the fact that he was one of the two doctors who signed the transfer order and that he must have known at the time that she was a

Christian Scientist who had objected to medication.

Doctors Grant and Kosovic of Bellevue defaulted in answering. Plaintiff testified that she thought a nurse named Grant had given her an injection. Dr. Grant was in fact a medical resident, and appeared on the order sheet for May 7, 1968 as having prescribed 100 mg of thorazine, an increase over the 50 mg previously prescribed by Dr. Kosovic. Dr. Kosovic had found that she was paranoid, that "Her affect was inappropriate," and that she was not able to take care of herself and needed hospitalization.

Dr. Dromgoole is the only defendant still working in the same hospital. She was a psychiatric resident in 1968 and is now a staff psychiatrist at Central Islip Hospital. She attended

most of the trial. The plaintiff testified that she recognized her and must have told her that she objected to being given medication. Dr. Dromgoole's name was not on the doctors' order sheets. She testified that the plaintiff was not her patient, and that she was not responsible for Dr. Jordan, who prescribed most of the medication administered at Central Islip. Dr. Dromgoole's only real connection with the case was that she was on the committee that passed on plaintiff's discharge, and directed that she be given a one week supply of Mellaril (which she said she threw away). Her note of July 17, 1968 stated, "She is a Christian Scientist. However, she takes her medication and is no problem at ward adjustment. . . Mental condition: Much improved."

Dr. DaCorta was a supervising psychiatrist, one of Dr. Jordan's superiors. He approved plaintiff's voluntary status on June 18, and made a diagnosis of schizophrenic paranoid type on June 27th. From these facts the jury could have inferred that he had read her record and knew that she was a Christian Scientist, and that medication had been prescribed. The Central Islip chart reflects only one objection to medication, a note of Dr. Jordan's on May 29, 1968.

Dr. O'Neill is sued as Director of Central Islip State Hospital. The complaint contains no specific charge against him other than the general statement that "Each of the defendants, at all times relevant herein, was acting under color of a statute, ordinance, regulation, custom, or

usage of the State of New York."

The unarticulated theory of the complaint appears to be that he should have exercised his power as administrator to announce a regulation forbidding the administration of medication to patients who voiced religious objections to such treatment. Plaintiff was one of 8,000 persons in the hospital. Dr. O'Neill had no personal recollection of her, or of any specific Christian Scientist among the patients. He permitted Christian Science practitioners to visit the hospital and to hold services. During the twenty-two years that he was director of the hospital, he had heard no objection to the administration of drugs to Christian Science patients, until the complaint in this action was served on him.

Representatives of Christian Science

groups met with him from time to time. Their discussion related primarily to the conduct of religious services and means of making such services known to Christian Scientists among the patients. No Christian Science representative had voiced any objection to medication.

Dr. Miller, as Commissioner of Mental Hygiene at the time of plaintiff's hospitalization, administered institutions with 110,000 patients. He had never been informed of any issue concerning objections to medication by Christian Scientists. Neither the American Psychiatric Association nor the National Institute of Mental Health had any regulations on the subject. During his administration, he had drafted regulations on the rights of a patient. During the long development

of these regulations in the bureaucratic hierarchy, no one had suggested any statement concerning religion, before the complaint in this case was served. The regulations, as promulgated in 1975 by the new Commissioner, now specify that doctors should honor religious objections to medication, but the court refused to let the jury consider these facts in connection with the 1968 incident.

The claim against Dr. Thomas as Director of the Psychiatric Division at Bellevue, was withdrawn by plaintiff at the time of the third Court of Appeals decision, when it appeared that he had not been Director at the time of the incident.

Although the city defendants (the Bellevue doctors) were the only parties to demand a jury trial, once it was selected, all parties consented to a

jury determination of all the issues. Plaintiff's counsel requested at the end of the case that the damages against the defaulting defendants, Grant and Kosovic, be decided by the jury rather than the court. The form of verdict which was submitted to the parties in advance and was used by the jury contained spaces for recording a decision for the plaintiff or for the defendant with respect to each defendant, as well as for fixing damages, both compensatory and punitive, but the jury was instructed that they should find for the plaintiff with respect to Doctors Grant and Kosovic. The jury verdict, however, comprised findings for each defendant, including Doctors Grant and Kosovic.

Discussion

The plaintiff's eighteen grounds to

set aside the verdict will be examined separately.

1. Plaintiff argues that the jury's verdict for defendants Grant and Kosovic indicates that they disregarded the court's instructions, and that this disregard requires a new trial as to all defendants. The cases which are cited in support of this proposition bear too little resemblance to the facts here for any useful comparison. Nor is the general statement in 6A Moore's Federal Practice ¶ 59.081, p. 59-139 (1974) any more relevant.

With respect to defendants Grant and Kosovic, the jury's determination to treat them in the same way as the other defendants is understandable. A lawyer realizes that a defaulting defendant must pay even though the other defendants won their cases, and that

evidence of good faith may not be considered in their favor, but such a result might well seem illogical and unfair to a jury of laymen. The jury may also have been confused by the fact that the verdict form gave them an opportunity to decide for these defendants as well as to allow damages against them.

Plaintiff, in asking that the jury fix the damages against the defaulting defendants, may have taken the risk that they would find that the plaintiff in fact suffered no damage. Nevertheless it appears fair in this case to give plaintiff some relief against the verdict.

There is no occasion for granting a new trial, since the court has heard all the testimony and it has power to make new findings and conclusions under F.R.Civ.P. 59(a)(2). The defaulting

defendants did not ask for a jury verdict, and therefore are not prejudiced by the court's deciding now to take the issue of damages away from the jury. Plaintiff is not prejudiced, since she had no right to a jury on the issue.

On the basis of the evidence, and particularly the doctors' notes in the Bellevue Hospital report, the court finds that defendant Grant is liable in the sum of \$300.00 and defendant Kosovic in the sum of \$500.00.

Setting aside the verdict for the defendants Grant and Kosovic is no justification for granting a complete new trial. In Rivera v. Farrell Lines, Inc., 474 F.2d 255 (2d Cir.), cert. denied, 419 U.S. 851, 94 S.Ct. 122 (1973), which the plaintiff cites, the court found error in the charge concerning contributory negligence and directed

a trial on all issues, since it could not determine the extent to which the finding of contributory negligence affected the verdict. Since the defendants' liability here was individual, error with respect to defendants Grant and Kosovic would not affect the rest of the verdict.

2. Plaintiff complains that the court did not use the word "presumption" in mentioning the irrelevance of commitment to a mental hospital. The use of a technical word like presumption, which legal scholars have difficulty in defining, would not have been helpful in giving instructions to a lay jury. The court said in its charge (p. 7) that

[T]he law in New York is that a finding of mental illness, even by a Judge and a Jury and commitment to a hospital doesn't prove that the patient is incompetent or unable to manage herself

or her affairs.

And continued that

A person not found to be incompetent by a judge or jury has a constitutional right on religious grounds to refuse to take drugs that are not necessary to save that patient's life. . . .

This was as favorable an instruction as plaintiff could properly ask, and in any case, except for the verbal charge from "raise a presumption" to "prove," was all that the plaintiff asked.

3. Plaintiff complains of the court's refusal to adopt verbatim nine of its sixty-eight requested instructions. The words which the court used were a suitable paraphrase of portions of the language of the Supreme Court in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975) and O'Connor v. Donaldson, 422 U.S. , 95 S.Ct. 2486 (1975).

The Supreme Court opinions were not designed to formulate instructions to a lay jury. There is no requirement that the court repeat them verbatim in full. The issue was properly stated at page 10 of the charge as whether

. . . the defendants reasonably believed in good faith that his or her actions, conducts or omissions didn't violate what she or he should have reasonably known to be a clearly established constitutional right. . . .

4. Plaintiff objects to a reference by the court during the voir dire of jurors to the fact that the defendants were individually liable rather than the city or the state. No suggestion is made that the city would reimburse the Bellevue doctors if they were held liable, even though it did supply free counsel. The provision in the New York

Public Officers Law § 17 concerning state employees was not in effect when the acts in question were performed, and therefore does not apply. See L.1971, c.1104, § 3; Public Officers Law § 17 note p. 29 (McKinney's Supp. 1975 - 76).

In any event, the Public Officers Law does not apply to a "willful and wrongful act," such as plaintiff here alleged.

5. Plaintiff complains of the court's refusal to use six of her twenty-four proposed voir dire questions. The court dealt on voir dire with the prospective jurors' knowledge of the parties, their prior jury service, their employment, the employment of any family members by the city, the state, any mental hospital, or any psychiatrist, their participation in any litigation with the city or the state, their experience

with Bellevue or Central Islip or any other mental institution, their willingness to follow instructions concerning the right to refuse hospitalization or treatment, their affiliations with Christian Science, whether they were very religious, moderately religious, or not religious, and where they resided. There was no need to probe the other specific matters which plaintiff requested.

6. The direction of a verdict for defendant O'Neill was not forbidden by the Court of Appeals' first decision sustaining the complaint against him. What the Court of Appeals said was that there should be a "trial on the merits." 446 F.2d 65, 71. The facts produced at trial, as outlined above, show no basis for any finding of personal responsibility of Dr. O'Neill for the medication of which plaintiff complains. The court's

granting the defendant O'Neill's motion for a directed verdict, pursuant to F.R.C.P. Rule 50(a), was in accord with the often-articulated standard that

a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion.

5A Moore's Federal Practice ¶ 50.02[1], p. 2320 (1975).

7. Plaintiff complains of the court's statement (p. 13) that

[U]ntil 1971 no court in this state had ruled on the First Amendment right to free exercise of religion, that a Christian Scientist who is legally admitted to a mental hospital had a constitutional right to refuse proper medication.

This statement was factually correct and was followed by a further statement that

You may consider the importance of the First Amendment and the fact that it's been part of the Constitution for 200 years in determining whether the defendant should nevertheless have foreseen that such administration of drugs after a protest on Christian Science grounds was a violation of constitutional rights.

The charge as given did not prejudice the plaintiff.

8. Plaintiff complains that the court did not include the word "sincerely" in its description of the elements of good faith. The evidence was clear and undisputed that the defendant doctors were each acting in the sincere belief that the administration of thorazine was proper treatment for the plaintiff.

Even though the plaintiff's insistence on a particular word seemed inappropriate, the court inserted it in its final

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instructions to the jury when they asked for a repetition of the charge on good faith. The plaintiff was not prejudiced by the charge on this point.

9. Plaintiff contends that the defense of good faith should have been permitted only for those defendants who actually introduced some evidence on the subject. Evidence, however, is not restricted to a particular defendant. The copious testimony concerning the general recognition of thorazine as proper treatment for schizophrenia was available in support of claimed good faith with respect to all defendants. The hospital records, which were among the exhibits that the jury requested within five minutes after they began their deliberations, also contained comments on plaintiff's condition when she was admitted to Bellevue, which

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might have supported a good faith belief by any trained psychiatrist that she required treatment with thorazine. Moreover, Dr. O'Neill testified that his examination of plaintiff's file showed no indication of malice or animus by any doctor.

10. Plaintiff has combined Objection 10 with Objection 9.

11. Plaintiff complains that instructions on the good faith defense were not sufficiently "balanced." The court stated specifically (p. 11) that

The burden is on each defendant to prove each element of his good faith defense by a preponderance of the evidence.

Furthermore, the court properly instructed the jury on the circumstances under which the jury must rule against the defendants

as well as circumstances compelling a verdict against the plaintiff (p. 12):

[I]f you find a defendant violated the constitutional rights and that there is no evidence from which you can say the defendant acted in good faith, or failed to carry the burden of good faith, then you should enter a verdict for the plaintiff against the defendant. If you find a defendant didn't violate plaintiff's constitutional rights or if she acted in good faith as I have defined [it,] then you should enter a verdict for that defendant.

12. Plaintiff attacks the instructions about defendant Dromgoole as a supervisor. The court said (pp. 9-10) that

... [L]iability has to be founded on personal grounds. You can't hold one person liable for what somebody else did unless there was a failure of actual duty of supervision.

and (pp. 24-25)

You can't charge any of the defendants for any acts which were done by the other doctors unless those doctors were under the

direct supervision of one of the defendants here.

Under the facts concerning Dr.

Dromgoole's action in the case, there is no substance to this objection.

13. Plaintiff next criticizes the court's characterization of the evidence, particularly the statement that holding defendant Miller liable on the basis of the evidence would constitute a "strict standard." This was certainly true, in the light of his never having received a complaint from anyone that Christian Scientists in any mental hospital objected to the administration of suitable drugs to improve their conditions.

14. The "miscellaneous closing remarks" to which the plaintiff objects require no comment.

15. Plaintiff also objects to statements by defense counsel as incorrect

or erroneous. The jury were instructed (pp. 2, 26) that their recollection of the evidence governed, whatever counsel or the court might say. No further comment was required by the court.

16. The plaintiff objects to the exclusion of evidence of a regulation adopted in 1975 concerning the administration of medication over religious objections. This did not contradict the statements in Dr. Kolb's book that thorazine was the preferred treatment for persons suffering from schizophrenia. In any event, under the "subsequent repairs" rule, Smyth v. Upjohn Co., F.2d

(2d Cir. Dec. 2, 1975), the 1975 regulation was not admissible as bearing on the conduct of the individual defendants in 1968.

17. Plaintiff asserts that counsel

should have been permitted to question Dr. Miller about the administrative steps he took after the Court of Appeals decision in this case in 1971. Since the issue was the propriety of the defendants' actions in 1968, action in the 1970's was clearly irrelevant.

18. Finally, plaintiff objects that she should not have been required to prove that her constitutional rights were violated. What the Court of Appeals held on the first appeal was that the complaint stated a cause of action. Defendants' motion to dismiss the complaint was treated as a motion for summary judgment because it was accompanied with affidavits. However, the court's direction was that the district court "proceed to trial" - which clearly means that plaintiff must prove that in fact she did believe in

Christian Science, that she objected on religious grounds to medication, and that particular defendants violated her rights, and defendants must have an opportunity to prove that they were acting in good faith.

Conclusion

The complaint asks for a declaratory judgment and an injunction against further violation of plaintiff's constitutional rights, and for damages. She has obtained a clear declaration of the law from the Court of Appeals. Her claim for damages against the doctors was less well founded on the facts than the legal point which she presented. Nothing would be gained by prolonging this litigation.

It is ORDERED that plaintiff's motion be granted to the extent of setting aside the verdict in favor of

defendants Dusan Kosovic and Sandra Grant, and denied in all other respects; that the Clerk of Court enter judgment in favor of plaintiff against defendant Dusan Kosovic in the sum of \$500.00 and in favor of plaintiff against defendant Sandra Grant in the sum of \$300.00, with costs against each of them in respect of the issue of damages; and that the Clerk of Court enter judgment for the other defendants in accordance with the jury verdict.

/s/
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
MIRIAM WINTERS, on behalf of:
herself and all other
persons similarly
situated,
-----x

Plaintiff, : No. 69-C-783
: :
-against- : Memorandum of
: Decision and
: Order
: :
ALAN D. MILLER, M.D., : March 1, 1977
individually and as :
Commissioner of Mental :
Hygiene of the State of :
New York, et als, :
: :
Defendants. :
-----x

APPEARANCES:

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MISHLER, CH. J.

The plaintiff moves for an order
granting her, inter alia, a new trial,
pursuant to Rule 59(a) of the Federal
Rules of Civil Procedure.

This long-lived case is presently
on appeal to the Court of Appeals
for the Second Circuit from the denial
of plaintiff's previous motion for a
new trial. The notice of appeal was
filed on January 3, 1976, and an order
to proceed in forma pauperis on the
appeal was entered on February 19, 1976.
Since that time the plaintiff has been
unable to obtain a complete set of
transcripts. The unavailability of
transcripts for portions of the trial
is the basis of the instant motion.

Briefly stated, this action was
brought pursuant to 42 U.S.C. §1983 by a
follower of Mary Baker Eddy, Christian
Scientist, who, after involuntary

hospitalization, was administered medication despite her religious objections. The defendants are the Directors of Bellevue and Central Islip Hospitals, the Commissioner of Mental Hygiene of the State of New York, and staff doctors of Bellevue and Central Islip. The original complaint was dismissed for failure to state a claim upon which relief could be granted. Winters v. Miller, 306 F. Supp. 1158 (E.D.N.Y. 1969). That decision was reversed with the direction that the case be remanded and set for trial on the merits. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), cert. denied, 404 U.S. 985, 92 S.Ct. 450 (1971). Following lengthy pretrial proceedings, see Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) and Winters v. Miller, 517 F.2d 1337 (2d

Cir. 1975), the case went to trial before the late Judge Orrin G. Judd. The trial, held on July 23-31, 1975, resulted in jury verdicts in favor of all defendants. On December 16, 1975, Judge Judd denied post trial motions to set aside the verdicts and for a new trial. The notice of appeal was filed in January 1976.

By July 19, 1976, after some delays by the court reporters' office and three rescheduling orders from the Court of Appeals, the plaintiff was in possession of the transcripts of the trial testimony. The transcripts of the voir dire and pretrial bench conferences were promised first for August, then for September, and then November. In December 1976, the plaintiff was informed by Joseph Barbella, the Chief Court Reporter, and Emanuel Karr, also of the court reporters' office, that the general policy was not

to record pretrial proceedings in civil cases.

Jurisdiction

The threshold question is whether, subsequent to the filing of a notice of appeal, a district court has the power to consider a motion for a new trial. The filing of a timely notice of appeal divests the district court of authority to proceed further with the case, except, inter alia, in aid of of [sic] the appeal or to correct clerical errors. Sykes v. United States, 392 F.2d 735, 738 (8th Cir. 1968); Lloyd v. Lawrence, 60 F.R.D. 116, 118 (S.D. Tex. 1973); 9 Moore's Federal Practice ¶203.11, at 734 (1975). In Herring v. Kennedy-Herring Hardware Co., 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit devised a procedure for dealing with motions for new trials based on the

appellant's inability to obtain a stenographic transcript, when such motions are made after filing a notice of appeal:

The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), Rules of Civil Procedure, rests with the District Court, not the Court of Appeals. . . . [A]ppellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court. If, after a full and careful investigation of the problem, the District Judge is of the opinion that a fair and satisfactory record can be prepared for the purpose of a review of this case by the Court of Appeals, or if the failure to prepare such a record is due to the inexcusable neglect of the appellant to preserve his rights in the matter or to his failure or refusal to fully cooperate, he will so state and the pending motion for a remand will be overruled. If, without fault on the part of the appellant, or because of the failure of the appellee to fully cooperate in the matter, the District Judge is of the

opinion that a record cannot be prepared and presented to the Court of Appeals which will fairly and satisfactorily enable the Court to review the judgment entered in this action and that the appellant should be granted a new trial, he will so certify to this Court and the pending motion for a remand will be sustained for action by the District Judge on the motion under consideration by him.

Id. at 203-04, citing Smith v. Pollin, 90 U.S. App. D.C. 178, 194 F.2d 349 (D.C. Cir. 1952). Accord, First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343, 345-46 (6th Cir. 1976); Hydramotive Mfg. Corp. v. SEC, 355 F.2d 179, 181 (10th Cir. 1966).

In this circuit, a similar procedure was adopted in Ryan v. United States Lines Co., 303 F.2d 430, 433-34 (2d Cir. 1962). See Harper Bros. v. Klaw, 272 F. 894, 895 (2d Cir. 1921) (pre-Federal Rules); Sampson v. Ampex Corp., 335 F. Supp. 242, 246 n. (S.D.N.Y.

1971 (dicta) aff'd, 463 F.2d 1042 (2d Cir. 1972); 9 Moore's Federal Practice ¶203.11, at nn. 6 & 10 (1974 and 1976 Supp). Thus, we have jurisdiction to deny the motion outright or to certify to the Court of Appeals that the record is inadequate for review and therefore a new trial will be ordered.

Inadequacy of the Record

The unavailable transcripts affect only three of the claimed errors on the appeal from the denial of the first motion for a new trial. First, the plaintiff argues that the court erred in refusing to ask certain questions of prospective jurors. This claim, however, hardly depends on a transcription of the voir dire since the unasked questions are available to the plaintiff. Second, the plaintiff challenges a ruling of

the trial court in placing the burden of proof on the plaintiff. Again, this claim involves a legal issue that can be resolved without a record of the pretrial proceedings. Finally, the plaintiff argues on the appeal that the trial judge "displayed a general prejudice, hostility and antagonism toward the plaintiff . . . leaving the jury with the distinct impression that the Court considered Plaintiff's case to be weak or frivolous." Since a transcript of the trial itself is available, the plaintiff has a complete record of the trial judge's demeanor in front of the jury. We take judicial notice of the late Judge Judd's reputation for fairness, impartiality and objectivity in the conduct of a trial.

In sum, in this case the inability "to obtain a stenographic transcript of

the evidence is not, standing alone, sufficient to set aside a judgment and grant a new trial." Herring v. Kennedy-Herring Hardware Co., supra at 203. ^{/1} The motion for a new trial is denied, and it is

SO ORDERED.

/s/

U. S. D. J.

71 In the alternative, the plaintiff, joined by the defendants, requests an investigation of the handling of the record by the court reporters' office. Further investigation of the regrettable delay in the preparation of the transcripts would be fruitless. Much, if not all of the problems, are traceable to a Mr. Ira Rubinstein, who has since left the court reporters' office. Mr. Rubinstein, time and again, demonstrated irresponsibility and carelessness in the performance of his duties. The present situation is one more example. As to the absence of transcripts for the voir dire and pretrial bench conferences, I can confirm that, except in special circumstances, these proceedings are not recorded by the reporters.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94—September Term, 1970.

(Argued October 7, 1970 Decided May 26, 1971.)

Docket No. 34521

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated, 446 F.2d 65 (2d Cir. 1974).

Plaintiff-Appellant,

—v.—

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

Before:

MOORE, SMITH and ANDERSON,
Circuit Judges.

Appeal from order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge*, granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action

brought pursuant to the federal civil rights statutes, 42 U.S.C. §1983 and 28 U.S.C. §1343(3). 306 F. Supp. 1158 (1969). Reversed and remanded.

BRUCE J. ENNIS and WILLIAM H. PRATT (New York Civil Liberties Union, New York, N. Y.), *for Plaintiff-Appellant.*

EDMUND B. HENNEFELD (J. Lee Rankin, Corporation Counsel of the City of New York, New York, N. Y., Stanley Buchsbaum, of counsel), *for Defendant-Appellee Thomas.*

JOEL H. SACHS, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Defendants-Appellees Miller and O'Neill.*

SMITH, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Eastern District of New York (Anthony J. Travia, *Judge*) granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action brought pursuant to the federal civil rights statutes [42 U.S.C. §1983 and 28 U.S.C. §1343(3)]. The opinion below is reported at 306 F. Supp. 1158 (1969). We reverse and remand for further proceedings as to the claim for damages resulting from the forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment.

As a preliminary matter we note that jurisdiction is properly founded under 28 U.S.C. §1343(3) since the rights

infringed are unquestionably those of "personal liberty" rather than "property." [Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969); Johnson v. Harder, — F.2d — (Docket No. 35168, decided).]

Miss Miriam Winters is a 59 year-old spinster who has been supported under public assistance for over 10 years. For several years she had lived in a hotel in Brooklyn, New York and had created some difficulty there because of her constant demands that she be given a room with a private bath and because of her alleged failure to maintain a proper state of personal cleanliness.

In early 1967, she was told by her welfare case worker that she could obtain a room with a private bath with the approval of a physician or a psychiatrist. Accordingly, at her request, she was seen by Dr. Robert Reich, a psychiatric consultant to the Department of Welfare. Following this examination Miss Winters was told that she would be given a room with a private bath if she would move to the King Edward Hotel in Manhattan, which she agreed to do, and in mid-April she took up residence there. On May 2, 1968 when Miss Winters attempted to pay her rent for that month she was told by the hotel management that she could not continue to occupy the room she was in but would have to move to another room in the same hotel. This she refused to do, and as a result, the hotel management summoned the police, and she was taken by them to Bellevue Hospital where she was involuntarily admitted pursuant to section 78(1) of the New York Mental Hygiene Law.¹

¹ New York Mental Hygiene Law, Section 78(1):

"The Director of any hospital maintaining adequate staff and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care, or treatment."

On May 7, 1968 appellant was examined by two staff psychiatrists at Bellevue who certified her need for care pursuant to section 72(1) of the New York Mental Hygiene Law which provides for commitment for up to 60 days upon the filing of a "two physician certificate."²

For 10 years prior to her admission to Bellevue Miss Winters had been a practicing Christian Scientist. When she was admitted she refused to allow a doctor to take her blood pressure stating to him that she was a Christian Scientist, and the Bellevue records contain several references to this fact indicating that the hospital clearly had notice of her religious beliefs. In spite of this, however, and over her continued objections she was given medication (for the most part rather heavy doses of tranquilizers, both orally and intramuscularly) continually from the time of her admission until she was discharged on June 18, 1968. On May 13, 1968 she was transferred from Bellevue to the Central Islip State Hospital on Long Island. Again the record clearly indicates that she brought her objections to physical medication to the attention of the hospital staff, but her protests were ignored.

The primary question raised in this appeal is whether appellant's constitutional rights were violated when she was given medical treatment over her objections, which

² New York Mental Hygiene Law, Section 72(1):

"The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission by . . . any public welfare officer of the town . . . or in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital or by the director or head of any other hospital where such person may be."

were religious in nature, and whether she is therefore entitled to relief under the federal civil rights statutes.

It should be emphasized at the outset that appellant had never been found by any court to be "mentally incompetent," nor, so far as the record shows, were any facts alleged by the medical personnel who attended her which would justify a finding by a court of "mental incompetence." Neither did any court ever find that she was "mentally ill," although the two physicians who examined her (pursuant to section 72(1)) did state that in their opinion she was suffering from a "mental illness."

However, the law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs.³ *Sengstock v. Sengstock*, 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958); *Finch v. Goldstein*, 245 N.Y. 300 (1927).

It is clear and appellees concede that if we were dealing here with an ordinary patient suffering from a physical ailment, the hospital authorities would have no right to impose compulsory medical treatment against the patient's will and indeed, that to do so would constitute a common law assault and battery. The question then becomes at what point, if at all, does the patient suffering from a mental illness lose the rights he would otherwise enjoy in this regard.

³ Of course, certain prior actions of persons adjudged mentally incompetent may subsequently be found voidable once incompetency is judicially established.

The court below was apparently of the view that *any* patient alleged to be suffering from a mental illness of *any* kind (even those confined under the "emergency" provisions of section 78(1) where the allegations of mental illness need not be made by a physician) loses the right to make a decision on whether or not to accept treatment. Judge Travis reasoned as follows:

In mental cases, the public interest in treating and caring for patients is greater than the public interest in cases of physical illness. Most patients who are physically ill will be able to determine that they need treatment and, when informed by their physicians, will be able to make a reasoned decision as to the type of treatment to which they wish to subject themselves. But a mental patient, because of the nature of his illness, may be unable either to seek appropriate treatment or to determine what treatment to allow. For the physically ill person, where there are no dependent children or communicable diseases involved, the danger from a refusal on religious or any other grounds to allow a particular type of treatment may be that the patient will die. Only the patient and his immediate family are likely to be aggrieved or injured as a result. On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense. Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practitioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step

backward in the history of mental hygiene. [App. p. 124a].

Appellant argues, however, that if we concede the right of others to refuse treatment because they are Christian Scientists or hold similar religious views in this regard, then in the present case, where there is clear evidence that appellant's religious views pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees substituting their own judgment for that of their patient. The Illinois Supreme Court in *In Re Brooks Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965) recently considered this question at some length.

When approaching death has so weakened the mental and physical faculties of a theretofore competent adult without minor children that she may properly be said to be (legally) incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept knowing death would result from such refusal? [205 N.E.2d at 438].

The court answered this question in the negative and ruled that even if she were found to be legally incompetent, she nevertheless was entitled to refuse treatment because of her religious beliefs.

To what extent then may the state constitutionally compel actions which violate an individual's religious beliefs? The Supreme Court has here, as in a number of other areas, arrived at an "ad hoc" balancing test which ex-

amines the facts of each particular case to establish the contours of the free exercise clause rather than attempting to formulate any *per se* rules. The leading case is Mr. Justice Jackson's opinion in *West Virginia v. Barnette*, 319 U.S. 624 (1943).

In weighing the arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases where it is applied for its own sake. The test of legislation which collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include so far as the due process test is concerned, power to impose all the restrictions which the legislature may have a "rational basis" for adopting. But freedom of speech and of the press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. [319 U.S. at 639].

It is precisely the same error of reasoning suggested by Mr. Justice Jackson that appellees and the court below made in the present case. At most, the arguments and cases on which they rely support the finding of a "rational

basis" for the state acting in the way it did in the circumstances of Miss Winters' case, but First Amendment rights do not rest on such "slender grounds."

The appellees suggest a number of similar situations where the courts have held that the state's interest outweighs any First Amendment rights. [E.g. *Jacobson v. Massachusetts*, 191 U.S. 11 (1905) (compulsory vaccination); *Pierce v. Massachusetts*, 321 U.S. 158 (1944) (violation of the child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 410 Ill. 295, 102 N.E.2d 340 (1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 176 N.Y. 201 (1903) (serious illness of a child). These cases are, however, inapposite for each involved a clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his "free exercise" rights. In the present case, the state purports to find an "overriding secular interest of public health and welfare" in the "care and treatment of persons suffering from a mental disorder or defect and [in] the protection of the mental health of the state." Yet there is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party. The appellees rely on the fact that the Bellevue authorities found that she was "possibly" harmful to herself and to others. (This conclusion was indicated on one medical form after *one* examination, although at all other examinations conducted while she was hospitalized there was no indication of such tendencies.) Appellant, however, is not suggesting in this case that the authorities could not legally retain her in the

hospital, but rather only that her First Amendment rights were violated as a result of compulsory medication.

The appellees also rely on Judge Skelly Wright's decision in *Application of President and Fellows of Georgetown Hospital*, 331 F.2d 1000 (D.C. Cir.), rehearing denied, 331 F.2d 1010, cert. denied, 377 U.S. 978 (1964). There the patient had refused a blood transfusion on religious grounds where she "was in extremis and hardly *compos mentis* at the time in question." What appellees neglect to mention, however, is that Judge Wright was very careful to limit his action to the extreme circumstances there present.

The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find that the law required action, was a risk I was unwilling to accept. [331 F.2d at 1009-1010.]

Finally, the appellees argue that the state was acting as *parens patriae* with respect to Miss Winters and therefore had the responsibility as well as the right to decide what was best for her under the circumstances. It is the state's *parens patriae* power which had been the legal basis for the long series of court decisions which have denied parents absolute religious freedom with respect to various aspects of the care and upbringing of their children. The appellees go on to state "[i]n the area of mental health too, the State assumes the ultimate responsibility for the care of its citizens. It is fundamental to New York and federal law that the State acts in *parens patriae* as concerns mentally incompetent persons."

The basic fallacy of appellee's case thus becomes obvious. While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parcns patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her. As appellant points out, even if there is some way to find the kind of compelling state interest required to override the First Amendment, there clearly was not a compelling interest in so summarily forcing her to do so. Regular hearings of the New York Supreme Court are held in Bellevue Hospital every Tuesday morning. Plaintiff was admitted on Thursday evening. If appellees had respected her wishes for only four days, they could have brought her before the court for judicial resolution of the issue. At this hearing the appellant might have been able to persuade the court that she was not mentally ill. Or the court might have found that other alternatives would suffice. Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951):

This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.

Having concluded, therefore, that the appellant has stated a claim on which relief may be granted, we remand

the case to the district court with instructions that it proceed to trial on the merits.

The appellant also challenges the constitutional validity of the New York statute which provides for the compulsory fingerprinting and photography of state mental patients. Under section 34(9) of the Mental Hygiene Law the director of each state hospital is required within three days of admission to record the fingerprints and photograph every patient, whether admitted on a voluntary or involuntary basis. One copy of these is kept at the hospital and a second copy is filed with "any other state agency maintaining a fingerprint file."

The justification for this procedure offered by appellees is as follows:

Fingerprinting and photography of those individuals committed to State mental hospitals may be seen as needed devices to aid in identification of patients, identification of former patients at State mental hospitals, and the possible discovery of prior criminal convictions (which might be necessary to uncover or aid in proper diagnosis and treatment).

Appellant contends that this procedure violates her Fourth Amendment right to privacy, her Fifth Amendment right to substantive and procedural due process, and her Fourteenth Amendment right to equal protection of the laws.

The result sought by appellant, however, is precluded by Judge Weinfeld's recent opinion in *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, *aff'd per curiam*, 425 F.2d 1074 (2d Cir. 1970), *cert. denied*, — U.S. — (1970). These plaintiffs were challenging the constitutionality of the New York statute requiring the finger-

printing of employees of member firms of all national security exchanges. Judge Weinfeld noted:

Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality. Federal and state courts alike, in upholding fingerprinting requirements, have rejected any such view. Our Court of Appeals, almost forty years ago, in upholding the right of federal agents to take fingerprints after an arrest upon probable cause, even in the absence of statutory authority, observed, "Fingerprinting is used in numerous branches of business and of civil service, and is not in itself a badge of crime." 306 F. Supp. at 1007-1008.

Appellant attempts to distinguish this case by arguing that "no stigma is ordinarily attached to employment by stock exchange firms [while] the case is quite the contrary with confinement in mental hospitals." Absent some specific illustrations, however, appellant's argument that adverse collateral consequences will follow is mere conjecture.

The case is reversed and remanded with direction that the district court proceed to trial.

MOORE, *Circuit Judge* (concurring in part and dissenting in part):

I concur only in the portion of the majority opinion which holds that the appellant's constitutional rights were not violated when she was fingerprinted and photographed at Central Islip State Hospital, pursuant to §34(9) of the Mental Hygiene Law of New York.

I dissent as to the court's determination that it should reverse the trial court's grant of defendants-appellees' motion for summary judgment and, in effect, granting summary judgment for the plaintiff. I dissent on two grounds: first, because whether or not plaintiff's free exercise rights were violated, there is no appropriate relief which may be granted and hence the appeal should have been dismissed, and second, because plaintiff has failed to demonstrate an unjustified denial of any constitutional right.

I.

There are three named defendants in this case. They are: Alan D. Miller, M.D., Commissioner of Mental Hygiene of the State of New York, Alexander Thomas, M.D., Director of the Psychiatric Division, Bellevue Hospital and Francis J. O'Neill, M.D., Director of Central Islip State Hospital. As to these three defendants, it is entirely clear that money damages are completely inappropriate since there is no showing whatever that they in any way condoned the administration of drugs to the plaintiff. It is not shown that any of them had any information whatever as to the beliefs held by Miss Winters, or for that matter the treatment being accorded to her. All the record shows is that she brought her objections to certain members of the staff of each hospital, presumably the defendants "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff." Assuming, as the majority finds, plaintiff's constitutional rights were violated, an action under §1983 might be justified against the particular individuals who, acting under color of state law, unjustifiably violated plaintiff's constitutional rights. *Monroe v. Pape*, 365 U.S. 167 (1961). The named defendants were not such persons. In

our recent decision in *Sostre v. McGinnis*, — F.2d — (February 24, 1971), we held that Paul D. McGinnis, Commissioner of Corrections of the State of New York, could not be held liable under §1983 for damages notwithstanding that he knew of the fact of Sostre's confinement in segregation since the record, while demonstrating that Warden Follette had (as the majority found) detained Sostre in segregation because of his legal actions against the Warden and because of his political beliefs, did not demonstrate that McGinnis had been informed of these underlying reasons for Sostre's confinement, although McGinnis did know of the fact of such confinement. As with McGinnis in *Sostre*, the named defendants herein were not shown to have been informed of the circumstances which led the majority herein to conclude that plaintiff's rights were violated. In fact not only was there no showing that these defendants were aware of the plaintiff's religious beliefs but also there was no showing that these defendants were in any way aware of the treatment afforded Miss Winters.

To whatever extent, if any, the doctrine of "command responsibility" survives in the area of military affairs, that doctrine can have no applicability to the chain of responsibility in the state executive branch.

None of the "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiffs" can be held by this court to be liable for damages since no such person or persons have been served.

Therefore, there is no basis for granting damages to anyone currently before this court. Furthermore, since Miss Winters is no longer under the control of any of the defendants, and there is no showing that she is likely to

be brought under such control, it is clear that injunctive relief is also not in order. Similarly, declarative relief is inappropriate since there is no existing controversy.

The majority concludes "that the appellant has stated a claim on which relief may be granted" and thus "remand[s] the case to the district court with instructions that it proceed to trial on the merits." Based on the foregoing analysis, and barring any new evidence indicating injunctive or declarative relief may be appropriate, the district court may well conclude that no relief whatever is appropriate. However, I believe that we should have made this determination on the record before us and dismissed the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants. In failing to make this determination, this Court has, in effect, issued declarative relief without a present controversy.

II.

Furthermore, the majority in my judgment, is not correct in its conclusion that plaintiff was in any way unjustifiably denied her constitutional rights.

After asserting, in effect, that there is no basis here for finding Miss Winters to be possibly harmful to herself and others, the majority suggests that "it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her" and that "such a relationship may be created if and when a person is found *legally* incompetent," and not by a proceeding under §§72(1) or 78(1).

Does the majority mean by this that a person who is deemed to be potentially harmful to others could not, even in an emergency situation, be given appropriate drugs to

reduce the likelihood of such anti-social conduct in the absence of an adversary judicial determination of incompetence? In the face of danger to herself and others, must Bellevue's harried medical staff seek out a judge whenever the police present them with a person whose mental condition requires that she receive tranquilizers or other drugs to protect herself and others or do they mean that a person can be given drugs against his stated religious convictions in at least some circumstances where the patient has not been declared legally incompetent by judicial adversary determination?

I disagree in any event with the majority's implicit conclusion that, based on the record as it was before the court on the motion of defendants for summary judgment, the treating doctors were not justified in concluding that the medical treatment administered was not in the best interests of the patient and, on the contrary, would hold that this determination, being valid, justified the medical care given Miss Winters. The Millsian distinction between instances of harm to others and instances of harm solely to self, relied on by the majority, would seem rarely if ever to be relevant in actuality because others are affected by virtually any action which an individual takes or fails to take. Thus, while Miss Winters might not have been likely to perpetrate a violent attack on her fellow patients had she not received the tranquilizers here involved, the very conduct which led to her admission, if repeated in the ward, might well have been disruptive to the recovery of others in her ward, who themselves may have been suffering from psychological defects. Second, even if no one other than Miss Winters would have been directly aided by the treatment for the condition for which she was admitted, as Judge Travia pointed out in his opinion

below, if mentally ill persons are not accorded proper treatment, their "condition may progressively worsen, and the patient may become a public burden and expense."¹

More fundamentally, I believe that a §78(1) admission, as well as a two-physician admission under §72(1) constitutes a quasi-judicial determination under state law authorizing medical care of an individual notwithstanding her lack of consent thereto. The majority, while conceding that after a proper proceeding, such as New York's procedure for the adjudication of incompetence, it "may" be permissible for the state to administer involuntary medical care notwithstanding the religious view of the patient on a *parens patriae* basis (presumably without having to demonstrate any likelihood that the patient is dangerous to others) suggests that the §§78 and 72 procedures are inadequate from a due process point of view to justify such a *parens patriae* role. However, regardless of the validity of such determination from a due process point of view, the staff of the two hospitals here involved should be entitled to rely on such quasi-judicial authorization. Furthermore, plaintiff has explicitly chosen not to challenge the constitutional validity of the procedures under §§78 and 72. The majority suggests, in effect, that even assuming the validity of these determinations under §§78 and 72, their effect must, as a constitutional matter, be diminished so as not to provide for forced medical treatment in cases of religious objection because New York has chosen

¹ The effects on others thus pointed out are at least as significant as the effects involved in similar cases in the past. *Pierce v. Massachusetts*, 321 U.S. 158 (1944) [economic effect on others of giving jobs to the few minors with real religious objections to child labor laws probably minimal]; *Reynolds v. United States*, 93 U.S. 145 (1878) [speculative whether polygamous relationship harms children of such union; harm to society minimal where permission for such marriages conditioned on religious viewpoint].

to allow mentally ill persons undergoing involuntary medical care under these two sections to continue to exercise rights over property pending adjudication of "incompetence." With this conclusion I disagree.

That New York separates medical and legal aspects of the problem of mentally ill persons and provides for separate determinations in each area merely shows its enlightenment, since appropriate medical care hopefully might enable a person to continue to conduct his own affairs in other respects. The two-physician certificate procedure of §72(1) is subject to a judicial hearing. That procedure at least should meet the majority's concern that the patient be afforded an opportunity "to tell his side of the story." The §78(1) emergency admission procedure is not an adversary proceeding but obviously due process does not preclude preliminary relief in an emergency situation on an *ex parte* basis, including the right to administer involuntary medical treatment.²

In my view, Judge Travia has in a well-reasoned opinion based upon a sound analysis of the law and the facts reached reached the correct decision and, accordingly, I would affirm the order of the district court. I would also dismiss the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants.

² As noted, the admission procedures here involved are specifically not challenged by the appellant. Furthermore, §78 has been amended since the time of the hospitalization of Miss Winters.

CROSS-EXAMINATION

BY MR. WEILER CONTINUING:

Q Did you know why you left the King Edward Hotel?

MR. ENNIS: Objection. We return again to the circumstances of the commitment.

THE COURT: No. This is her state of mind at the time she was at Bellevue.

Q Did you know that?

A What, sir? I don't know what you asked.

Q Did you know under what circumstances that you left --

A No. I don't know why I was pulled out of my room. My door was smashed down and I was pulled out of my room and taken to Bellevue. I really don't know why unless that's

a common practice if one is without money and without friends and alone and then, that probably happened to a great many people. It certainly happened to me.

Q So, you don't know what happened?

A No. I don't know. I didn't know that if a person objected to giving up his room that he was taken to the psychiatric ward of any hospital. I never knew that.

Q Do you know you just raised your voice to me?

A I certainly know. I am very angry, very upset about it.

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A I must have, yes.

Q Medical treatment would include medication?

A Yes.

Q So you were aware at that time that the patient did not want medication on religious grounds?

A Can I comment on that? I was aware that the patient did not want medication, and that she was refusing medication on religious grounds. I don't know that I would necessarily draw the conclusion that that was all or that was the only reason she was refusing medication. As a matter of fact, I had my own thoughts why she was refusing medication which had to do with the fact that she didn't think she was mentally ill.

Q But at least one of the expressed reasons was that she thought it would violate her religious belief?

A Yes.

Q Was that the first time that any patient had ever objected to medication on religious grounds in your experience?

A That's the only time.

Q So it was an unusual even [sic] for a patient?

A Yes.

Q You were a resident, you were not yet qualified as a psychiatrist?